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Security Council

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Letter dated 12 July 2002 from the Permanent Representatives of Brazil, Canada, New Zealand and South Africa to the United Nations addressed to the President of the Security Council

The present letter concerns draft resolution S/2002/747, which is currently under consideration by the Security Council under the Bosnia and Herzegovina agenda item, but dealing in fact with the International Criminal Court (ICC). The consideration of this matter, under a Chapter VII resolution of the Security Council, is a matter of grave concern, as a large number of Member States have already expressed in the open debate held on 10 July. Since, in spite of the clear opposition of the international community to the Council's adopting the kind of resolutions it is discussing, the Council continues nevertheless to pursue this matter, we feel that it is our obligation to point out specifically that Council action is damaging international efforts to combat impunity, the system of international justice and our collective ability to use these systems in the pursuit of international peace and security.

Leaving aside the legitimacy of the Security Council's arrogating to itself the right to interpret and to change the meaning of treaties, which we challenge, we wish to focus on one of the unacceptable consequences of passing the draft resolution, which was distributed to the members of the Council in provisional form yesterday.

The International Criminal Court was always intended as a court of last resort, filling a void where States fail to undertake their international responsibilities to prosecute perpetrators of grievous crimes. The net effect of operative paragraphs 1 and 2 of S/2002/747 would be to remove that possibility in the specific cases of peacekeepers who may have committed crimes under the Court's jurisdiction, if that peacekeeper comes from a State not party to the Rome Statute. Further, the request to the Court in the draft resolution would be renewable on an annual basis which, for all intents and purposes, would amount to creating a perpetual obstacle to court action. Operative paragraph 3 would have the effect of directing States not to cooperate with ICC if that cooperation were in relation to such a peacekeeper. This means that if such a person were to be found in one of our countries and ICC wished to investigate or prosecute, having taken fully into account the principle of complementarity, the Council would have us refuse to surrender to the Court an alleged perpetrator of one of the three most grievous crimes.

While some States are able to prosecute under universal jurisdiction, many States do not have the ability or means to undertake such a prosecution. Should such an alleged perpetrator be found in a State that cannot exercise universal jurisdiction,

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that perpetrator would enjoy immunity from prosecution, the Council having putatively removed resort to ICC.

We are confident that no highly trained, professional military personnel would engage in acts actionable under the ICC Statute. But no one can give the same confident assurance about all personnel involved in peacekeeping. This is why we have been urging that a solution be found on a bilateral basis, and that the coverage of ICC not be removed from a whole class of international actors.

For this and other reasons cited in our presentations in the open debate, we respectfully request the members of the Council not to pass a resolution that would have such negative consequences.

We would ask that the present letter be made a document of the Security Council.

(*Signed*) Gelson **Fonseca**, Jr.
Ambassador and Permanent Representative
of Brazil

(*Signed*) Paul **Heinbecker**
Ambassador and Permanent Representative
of Canada

(*Signed*) Don **McKay**
Ambassador and Permanent Representative
of New Zealand

(*Signed*) Dumisani Shadrack **Kumalo**
Ambassador and Permanent Representative
of the Republic of South Africa